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Title: Powertech USA, Inc. Dewey-Burdoch
In Situ Uranium Recovery Facility

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ASLBP Number: 10-898-02-MLA-BD01

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 TELEPHONE CONFERENCE STATUS CALL

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8 In the Matter of: : Docket No.

9 POWERTECH USA, INC. : 40-9075-MLA

10 : ASLBP No.

11 (Dewey-Burdock In Situ : 10-898-02-MLA-BD01

12 Uranium Recovery Facility):

13 -----x

14 Thursday, November 16, 2017

15
16 Teleconference

17
18 BEFORE:

19 WILLIAM J. FROEHLICH, Chair

20 MARK O. BARNETT, Administrative Judge

21 G. PAUL BOLLWERK, III, Administrative Judge

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P R O C E E D I N G S

2:07 p.m.

CHAIR FROEHLICH: So good afternoon all. Thank you for your patience; my apologies for the delay. It's about eight minutes after 2:00 p.m. eastern time here. This is Judge Froehlich in Rockville, Maryland, with me is Judge Bollwerk and on the telephone line is Judge Barnett. Also with me here in Rockville are our law clerks, Lindsay Simmons and Kimberly Chu, who have been instrumental in arranging today's conference call. This is a telephone conference status call in the matter of Powertech USA Inc., docket number 40-9075-MLA, concerning the Dewy-Burdock In Situ Uranium Recovery Facility. Public notice of this telephone conference was issued on November 2, and provision has been made for a bridge line for the parties to this case, and for a public listen only line for interested members of the public.

At this time, I'd like to take the appearances of the parties to the proceedings and those of you who are with us today. For the licensee, for Powertech, counsel?

MR. PUGSLEY: Christopher Pugsley, counsel for Powertech, Your Honor.

1 MR. THOMPSON: Anthony Thompson, counsel
2 for Powertech.

3 CHAIR FROEHLICH: Thank you, gentlemen,
4 and for the Intervenor, the Oglala Sioux tribe?

5 MR. PARSONS: For the Oglala Sioux tribe,
6 this is Jeff Parsons.

7 MR. STILLIS: And for the Oglala Sioux
8 tribe, this is Travis Stills.

9 CHAIR FROEHLICH: Thank you. And for the
10 Consolidated Intervenors?

11 MR. FRANKEL: David Frankel here for
12 Consolidated Intervenors, thank you.

13 CHAIR FROEHLICH: And perhaps probably,
14 most importantly--

15 MR. BALLANCO: Tom Ballanco for the
16 Consolidated Intervenors as well.

17 CHAIR FROEHLICH: Oh, thank you Mr.
18 Ballanco. And most importantly, for the purposes of
19 this call, for the Commission staff?

20 MS. MONTEITH: This is Emily Monteith for
21 the NRC staff; with me is David Cylkowski and Patrick
22 Moulding, and our paralegal, Sabrina Allen, and also
23 with us are NRC staff Kelly Jennison, Deanna Diaz and
24 Cynthia Roman I believe is calling in and will listen
25 on the line.

1 CHAIR FROEHLICH: Thank you, Ms. Monteith.
2 Thank you all. As we proceed through this call, if
3 the parties would identify themselves before they
4 speak, it'll make things easier for our court reporter
5 and we'll have a better record of this conference
6 call. Let me give a very brief background of this
7 case and what brings us to this call today. On
8 February 25, 2009, Powertech submitted the Dewy-
9 Burdock license application to the NRC. It was
10 accepted for docketing October 2, 2009. After public
11 notice in the Federal Register on January 5, 2010, a
12 number of requests for hearing and contentions were
13 submitted. On March 12, 2010, the Commission
14 established this licensing Board to address those
15 contentions.

16 On August 5, 2010, this Board issued LBP
17 10-16, which granted standing to intervene and
18 admitted a number of contentions filed by the
19 Consolidated Intervenors and the Oglala Sioux tribe.
20 The NRC staff published its FSEIS in this case on
21 January 29, 2014, and on April 8, 2014, issued
22 Powertech license SUA1600. An evidentiary hearing was
23 held on the admitted contentions in Rapid City, South
24 Dakota on August 19 through 21, 2014, which resulted
25 in a partial initial decision by this Board issued on

1 April 30, 2015. That partial initial decision that is
2 relevant to this telephone conference found that
3 "without additional analysis as to how the Powertech
4 project may affect the Sioux tribe's cultural,
5 historic, and religious connections with the area,
6 NEPA's hard look requirement had not been satisfied,
7 and potentially necessary mitigation measures had not
8 been established."

9 All the parties appealed aspects of the
10 Board's findings on contention 1A to the Commission.
11 The Commission, in COI 16-20, issued December 23,
12 2016, denied each party's petition for review on this
13 issue, and left the proceeding open for the narrow
14 issue of resolving the deficiencies identified by the
15 Board. The Commission also denied both petitions for
16 review of the Board's retention of jurisdiction over
17 this NEPA contention. The Commission said "the staff
18 is free to select whatever course of action it deems
19 appropriate to address the deficiencies identified in
20 the Board's order." On August 3, 2017, the NRC staff
21 moved for summary disposition of contentions 1A and
22 1B. On October 19, 2017, the Board granted the
23 staff's motion as to contention 1B, concluding that
24 over the past two years, the NRC staff satisfied the
25 NHPA requirement that the NRC staff consult with

1 Oglala Sioux tribe.

2 The Board, however, denied NRC staff's
3 motion as to contention 1A, concluding that the NRC
4 staff had failed to establish that there are no
5 material facts in dispute relative to the NRC staff's
6 NEPA burden to adequately address the impact of the
7 Dewy-Burdock project on tribal cultural resources.
8 More specifically, the NRC staff has failed to
9 demonstrate that there is no material factual dispute
10 regarding the reasonableness of its method for
11 assessing impacts from the Dewy-Burdock project on the
12 Sioux tribal cultural resources. The Board's October
13 19, 2017 order established a schedule for this
14 proceeding that provides the NRC staff and the other
15 parties an additional opportunity to establish a
16 methodology for addressing cultural resource impacts
17 and resolve contention 1A.

18 On November 2, 2017, we issued an order
19 scheduling this telephone conference call. The order
20 stated that the Board would like to discuss the
21 parties' status in address the FSEIS deficiencies,
22 particularly as discussed in LBP 17-09, and we
23 included a list of six items that we used as a
24 starting point for our discussions. I think that we
25 will now proceed to those six points, and hopefully

1 expand upon them, and I'd like I guess to start with
2 counsel for the licensee, Powertech, and bring us up
3 to date on the status of development activities at the
4 Dewy-Burdock site. And again, if I could remind the
5 parties before they speak, would you identify
6 yourselves just so that the transcript is clear and
7 the court reporter attributes it to the right party.

8 MR. PUGSLEY: Yes Your Honor, this is
9 Christopher Pugsley for Powertech. Before giving you
10 a specific answer to question number 1 in the order,
11 I think the licensee would like to emphasize that it
12 has a sense of urgency in terms of trying to get this
13 issue resolved with all parties whichever way
14 possible. As I'm sure the Board is aware and all the
15 parties are aware, we have filed an appeal with the
16 Commission on this decision, but with a prescribed
17 course of action on how we believe that contention 1A
18 can be resolved. Obviously, the substance of those
19 arguments are present in the brief that everyone has
20 received, but we are very much interested in trying to
21 get this matter resolved one way or another, either
22 with the Board in satisfying the contention, or with
23 the Commission. So we just wanted to put that on the
24 record first.

25 But to answer question 1, there have been

1 no developments, site development activities at the
2 site, and for the following reason: that we are
3 required, as a licensee, under law, under the Safe
4 Drinking Water Act with the Environmental Protection
5 Agency, with the Bureau of Land Management under the
6 Department of Interior, and the state of South Dakota
7 to obtain additional permits and authorizations in
8 order to proceed with more site development
9 activities. Because these contentions have not been
10 resolved completely over the vast time frame that
11 we've been litigating these issues, we have not been
12 able to obtain these permits. And while we do not--we
13 have received a draft UIC permit from the
14 Environmental Protection Agency, and we have filed
15 comments on it, and it is currently being evaluated by
16 that agency.

17 We believe it's reasonable to assume that
18 the reason that such a long time has passed in terms
19 of obtaining those permits or proceeding with other
20 processes, such as hearings with the state of South
21 Dakota has taken so long is because we have not been
22 able to resolve these contentions. So for a specific
23 answer to the question number 1 is there have been no
24 site development activities, but we are very much
25 interested in trying to move expeditiously through

1 this process. So I'd like to just put that on the
2 record.

3 CHAIR FROEHLICH: Thank you, Mr. Pugsley.
4 Could we go through the three, I guess other agencies
5 that you mentioned in your response, and just give me
6 a sense of the pace at which things are proceeding
7 there. I think since the last time we spoke, I guess
8 there has been some action, I guess by the EPA, on the
9 injection permits; is that the UIC draft that you
10 referred to in your answer?

11 MR. PUGSLEY: Yes, the permits and
12 authorizations, Your Honor, we're required to get from
13 EPA include UIC permits as well as aquifer exemptions,
14 and we are working within that process to get that
15 accomplished; however, it has been a considerable
16 time, I'm not 100 percent sure of the time frame, but
17 I believe it's somewhere between eight and nine--seven
18 or eight or even nine years since we filed this
19 application. We have filed comments, the public has
20 been afforded an opportunity to file comments, but we
21 are still currently in the draft stage of the UIC
22 comments. The state of South Dakota has hearing
23 processes associated with large scale mining projects
24 as well as water rights, and those processes have been
25 stalled. Whether--we are not--we do not know formally

1 what the reason is, but we strongly, you know, we
2 think it's reasonable to assume that the state is
3 waiting to see what the licensing Board and/or the
4 Commission decide in this case. The Bureau of Land
5 Management is not as large scale an approval as the
6 other two agencies, but it is still in its, you know,
7 mid-range stages right now. We do not have any idea
8 when closure on that issue will occur.

9 CHAIR FROEHLICH: And just so I'm clear,
10 Mr. Pugsley, I understand from your answer that South
11 Dakota and the BLM hearings are perhaps tied to some
12 belief by both agencies that there's yet to be a
13 further order from the Commission or from the Board on
14 contention 1A, but the EPA proceeding is just the
15 normal way that these UIC requests are handled, but
16 that's not contingent on anything further coming from
17 this agency, is it?

18 MR. PUGSLEY: Well whether, Your Honor,
19 whether it be contingent on whether something comes
20 from the Nuclear Regulatory Commission, whether it be
21 the licensing Board or the Commission is not the issue
22 here. The issue is we have followed the procedures
23 that EPA has articulated under the Safe Drinking Water
24 Act, and it is--I know in my 16 ½ years' experience in
25 this industry, and I'm sure Mr. Thompson can opine on

1 this further in his much longer experience in this
2 industry, that this is a very, very long time for
3 something like this to be reviewed and approved, and
4 we are just--we are trying to seek closure to this
5 matter as quickly as we can because we do believe it's
6 reasonable to assume that these agencies are looking
7 to the Nuclear Regulatory Commission for what they are
8 going to do on this matter before they move forward.

9 JUDGE BARNETT: Judge Froehlich, can I
10 follow up?

11 CHAIR FROEHLICH: Of course.

12 JUDGE BARNETT: Mr. Pugsley, as I
13 understand it, you have an NRC license right now; is
14 that correct?

15 MR. PUGSLEY: Yes, sir. We do have a
16 Nuclear Regulatory Commission license that is
17 effective, but at the same time, these processes,
18 especially after the Board ruled on contention 1B with
19 the National Historic Preservation Act, which is a
20 statute that is independent of the Atomic Energy Act,
21 but as part of federal agencies' reviews of major
22 federal actions especially, and as well as NEPA, is as
23 review of major federal actions, and I apologize. The
24 National Historic Preservation Act is a review of
25 federal undertakings. But the point is that we don't

1 know--Powertech does not know whether or not--what is
2 taking so long here for us to get these things
3 accomplished, and we have given all the information
4 that is necessary to all these agencies for things to
5 be completed, but again, we think that resolution of
6 the matter with the Nuclear Regulatory Commission,
7 whether it be with the licensing Board through
8 satisfying the Board's order, or through the appeal we
9 filed with the Commission, would be very important to
10 getting these other processes commenced and completed.

11 JUDGE BARNETT: And have these other
12 entities given you any indication that they're waiting
13 on the NRC for anything?

14 MR. PUGSLEY: I do not know, sir. I don't
15 know whether or not they are actually waiting on NRC,
16 but it seems to counsel for Powertech that this
17 process has been abnormally long with these other
18 agencies for a project of this caliber.

19 JUDGE BOLLWERK: This is Judge Bollwerk.
20 Have you asked them?

21 MR. THOMPSON: This is Anthony Thompson,
22 Judge Bollwerk, and I'm pretty sure that there's no
23 question but that South Dakota has stopped going
24 forward with its stuff pending the NRC's completing
25 its situation. And to get an aquifer exemption is a

1 purely, you know, you just have to answer a few
2 questions and lay out things; it shouldn't take five
3 years or eight years.

4 JUDGE BOLLWERK: But even though there's
5 no question of that, but I don't know there's no
6 question; I mean have they said that?

7 MR. THOMPSON: I believe there were
8 indications given back when they had some hearings in
9 South Dakota that they were not going to go forward
10 with anything until the NRC was finished.

11 JUDGE BOLLWERK: Are they drafted
12 somewhere on anything that they issued?

13 MR. THOMPSON: We can go back and check.

14 JUDGE BOLLWERK: I would be very surprised
15 if they're waiting on the NRC petition to issue a
16 permit.

17 MR. THOMPSON: All I can tell you is my
18 recollection is that South Dakota said we are
19 suspending the hearing pending final decision by NRC.

20 JUDGE BOLLWERK: Okay, if there's
21 something like that in the record, I would certainly
22 like to see it.

23 MR. THOMPSON: Well, we will check.

24 MR. PUGSLEY: Yes, it's Chris Pugsley.
25 Again, Your Honor, certainly, as Mr. Thompson said, we

1 will go back and see if there's any documentation and
2 certainly we'll be happy to provide it.

3 CHAIR FROEHLICH: All right, thank you Mr.
4 Pugsley. Let us move to the second question that the
5 Board has outlined in our November -- and that
6 concerns the status of the parties' interactions with
7 one another in order to address the concerns that
8 arise out of contention 1A, and then maybe I can get
9 a feel for the effectiveness of the communication
10 between the parties. I'd like to hear maybe from each
11 of you, starting with the NRC staff.

12 MS. MONTEITH: Your Honor, Emily Monteith
13 for the NRC staff. Taking first your question about
14 communication, effectiveness of communication between
15 the parties, in April after the Board issued its
16 October 19th order, counsel for the staff initiated
17 discussions with counsel for the Oglala Sioux tribe on
18 how to conduct future communications between the staff
19 and the tribe. The tribe responded by email and
20 reaffirmed the staff's--the counsel for the NRC staff
21 affirmed that any communications between the staff and
22 the tribe will include the tribe's counsel.

23 CHAIR FROEHLICH: I think that should go
24 a long way in assessing the effectiveness of the
25 communication. Can you tell me the status of the

1 current interactions between the parties? I mean,
2 have you been in contact with the tribe and the other
3 parties subsequent to the order on the motion for
4 summary disposition?

5 MS. MONTEITH: We have been in
6 communications as we said on that question, and we
7 also consulted the question of the settlement, Judge.
8 But with respect to the substance of the staff's
9 future path forward for resolution of contention 1A,
10 we have not yet engaged in a substantive discussion of
11 that path. That's of course the subject of the
12 Board's next question, but we're happy to speak to the
13 status of our efforts now if that has--

14 CHAIR FROEHLICH: All right, so as I take
15 it, just to follow up, the order on summary
16 disposition came out October 19, and then I guess the
17 next thing the Board has heard from the staff was the
18 November 1 monthly report, and other than that, I
19 guess you're telling me that there haven't been any
20 formal communication between the staff and the
21 Intervenors? Is that correct?

22 MS. MONTEITH: That is correct. The staff
23 is in the midst of internal discussions regarding our
24 options for methodology to resolve--to further
25 identify Lakota Sioux cultural resources. So until

1 we've achieved alignment internally on that path
2 forward, we have held off on formal communications
3 with the tribe and with the licensee on that path
4 forward.

5 CHAIR FROEHLICH: Okay Ms. Monteith, so I
6 guess when you get the staff in line on alternatives
7 and different approaches, there is sort of a protocol
8 that you have in place already with the Intervenors to
9 sort of keep that communication flowing smoothly and
10 hopefully relatively quickly; is that correct?

11 MS. MONTEITH: Yes, Your Honor, as we
12 stated, we intend to communicate--all communications
13 between the staff and the tribe will certainly include
14 counsel for the tribe, and I believe that will move
15 this along as expeditiously as possible.

16 JUDGE BOLLWERK: This is Judge Bollwerk;
17 when do you expect to reach a staff position on
18 alignment?

19 MS. MONTEITH: Hopefully within the next
20 few weeks, Your Honor. We--as I said, it's premature
21 I think to give you--to submit a schedule on that, but
22 we are moving--

23 JUDGE BOLLWERK: Well time's a-wasting
24 here, so--

1 MS. MONTEITH: We understand, Your Honor.
2 We are--we're actively discussing this matter; we're
3 hoping to achieve an understanding and alignment on
4 the path forward, and at that time we would then I
5 believe reach out to the licensee and to the tribe
6 regarding that path. I think we can safely say that
7 we intend to do that before the end of the year, and
8 that sounds like quite a ways away, but I think our
9 hope is--

10 JUDGE BOLLWERK: Well December 15 is in
11 three weeks, can you--

12 MS. MONTEITH: I'm sorry Your Honor, can
13 you--

14 JUDGE BOLLWERK: December 15 is about
15 three weeks away; is that a good date?

16 MS. MONTEITH: I can't commit to a date,
17 Your Honor, I'm sorry, but we will certainly strive
18 for that.

19 CHAIR FROEHLICH: While we're on the
20 subject of communication, I'd like to hear from the
21 Intervenors and any efforts for movement, progress
22 that they've made in coming up with addressing the
23 Board's concerns and resolving contention 1A. Has
24 there been any discussions within the Oglala Sioux

1 tribe or with other Native American tribes as to how
2 this case can be resolved?

3 MR. PARSONS: Thank you, Your Honor. This
4 is Jeff Parsons for the Oglala Sioux tribe. As
5 counsel for staff indicated, there have been, although
6 no--I guess what you might consider formal exchanges,
7 we have had some email contact with regard to making
8 sure that there's some understanding as to the
9 protocol going forward, including making sure there's
10 inclusion of counsel in communications with the tribe.
11 One of the problems the tribe has obviously is until
12 the staff has some idea as to, as you mentioned,
13 alternatives or different paths to proceed that we can
14 evaluate and be engaged in discussion on it; it's sort
15 of hard for us to step out there. We'll note that in
16 the May 31, 2017 that we submitted to staff, we raised
17 a whole list of very substantive issues that we would
18 like to discuss in terms of how a survey would go
19 forward, and as it was in the prior stages of the
20 litigation, we feel that we've received no substantive
21 response to any of those discussion points. And so
22 while we feel that we've made a good faith effort and
23 put out some very sincere, meaningful points,
24 discussion fodder that is for discussion, we have not
25 received any sort of substantive response in turn.

1 CHAIR FROEHLICH: And Mr. Parsons while I
2 have you, have you made arrangements, or have
3 procedures been put in place within the tribe or among
4 the tribes to be able to formulate a response to the
5 staff when the staff comes forward hopefully by
6 December 15 on its plans for moving forward for
7 resolution of contention 1A?

8 MR. PARSONS: Well Your Honor--thank you,
9 this is Jeff Parsons again for the Oglala Sioux tribe.
10 We feel that we've been fairly responsive throughout
11 this proceeding; there have been a couple of hiccups
12 where there have been staff issues with the Tribal
13 Cultural Historical Preservation Office, but apart
14 from that, frankly I think that the tribe's responses
15 are prompt and substantive. In terms of other tribes,
16 the Oglala Sioux tribe is in very frequent
17 communication with officials from the other tribes,
18 and that I think would not be a major hurdle to
19 overcome. I will say that we suggested including
20 other tribes in this process from very early on, and
21 I will note that that is one of the bases on which NRC
22 staff unilaterally decided for the second time that
23 there was no more discussion to be had. That was sort
24 of a--it's somehow characterized by NRC staff as a new
25 development, that somehow we are newly pushing that

1 coordination with other tribes; we dispute that
2 vigorously obviously, and we're ready to engage on
3 that substance with NRC staff and other tribes and the
4 applicant at any time.

5 JUDGE BOLLWERK: This is Judge Bollwerk.
6 I need to get clarification; when you say other
7 tribes, do you mean other Sioux tribes or do you mean
8 other tribes that are not Sioux tribes?

9 MR. PARSONS: Generally speaking, I'm
10 talking about other Lakota Sioux tribes.

11 JUDGE BOLLWERK: Okay.

12 MR. PARSONS: However, I think if there
13 were other tribes that were interested in engaging and
14 participating, the overall Sioux Tribal Cultural
15 Historic Preservation officer would do whatever
16 possible to incorporate them as well, out of a sense
17 of comity.

18 JUDGE BOLLWERK: And Mr. Parsons, you made
19 reference to I guess a set of approaches that you
20 conveyed to the staff, what was the date of that
21 again?

22 MR. PARSONS: That was a May 31, 2017
23 letter.

24 JUDGE BOLLWERK: Okay, could I ask Ms.
25 Monteith if that letter is among the approaches that

1 the staff is considering or will be considering as it
2 plans its path forward?

3 MS. MONTEITH: Yes, Your Honor, we have
4 considered the substantive input provided by the tribe
5 in their May 31 letter. The staff is in the midst of,
6 as was stated before, in the midst of internal
7 discussions regarding adoption for a methodology to
8 further identify Lakota Sioux cultural resources.
9 These options that we are currently discussing
10 include, for example, a possible Tribal Field Survey
11 at the site, meeting with tribal council from Lakota
12 Sioux tribes, or interview the tribal elders and other
13 possibilities as well, and in our discussions
14 internally discussed joining these options, we
15 considers the information that was provided by the
16 tribe. What we are contending with right now is we
17 are presently weighing the efficacy, the overall cost
18 in terms of the financial costs, time and program
19 personnel commitments for these various options
20 identified as potentially feasible for resolution of
21 this contention.

22 CHAIR FROEHLICH: Thank you, that's very
23 helpful.

24 JUDGE BOLLWERK: This is Judge Bollwerk.
25 Just a little bit off this subject, go back to the

1 last one. Do the staff have any basis and knowledge
2 for the concerns that have been raised by Powertech
3 about the fact that, as I was saying, they're
4 licensed, they have an effective license, but somehow
5 this proceeding is holding up the other permits
6 they're looking for?

7 MS. MONTEITH: Your Honor, our
8 understanding is commensurate I believe with
9 Powertech's. I believe we have--the staff indicated
10 we have the same understanding regarding South
11 Dakota's suspension of the hearing pending final
12 decision by the NRC. Powertech is providing public
13 information on that, then we will defer to them to --
14 but that is our collective recollection. Further than
15 that, speaking to the EPA and Bureau of Land
16 Management, I have no further information.

17 JUDGE BOLLWERK: All right, thank you.

18 CHAIR FROEHLICH: Maybe I'd like to follow
19 up on Ms. Monteith's last answer with you, Mr.
20 Pugsley. Those approaches, are those methods that the
21 staff is considering for resolving contention 1A, do
22 any of them present any problems to the licensee from
23 the start, or do you have any opinion as to whether
24 these types of approaches will 1) resolve the case

1 promptly, or whether they present any problems for the
2 licensee in going forward?

3 MR. PUGSLEY: Judge Froehlich, Chris
4 Pugsley for Powertech. As we stated before, the Board
5 I'm sure is aware of our appeal to the Commission that
6 involved a prayer for relief that had a directive to
7 what should be sufficient for the staff to satisfy
8 contention 1A, which is a supplement of the FSEIS with
9 what activities had been conducted to date, and
10 whatever other information was available to supplement
11 the NEPA document. That is Powertech's current
12 position, it's what it believes is sufficient here, we
13 think it's consistent with the Board's rulings and the
14 Commission's rulings that the staff is free to take
15 the approach that it deems appropriate to satisfy the
16 contention, but what I can say is because prudence
17 dictates that in proceedings such as litigation that
18 we prepare for contingencies, that we have initiated
19 some discussions with our experts regarding how
20 Powertech possibly could be of assistance in the
21 process of options that potentially could be presented
22 by the staff to us for consideration to deal with the
23 identified deficiencies in the FSEIS. We have not
24 completed that process at this time, but we are
25 actively considering it, and--but at the same time, we

1 do continue to stand by our position in our appeal.
2 So to answer your question specifically, I'm not in a
3 position to answer to say whether or not any or all of
4 the options are something that would be actively
5 considered, or whether or not it would meet with one
6 of the other questions that we're going to discuss
7 later of whether things are cost prohibitive. But I
8 can say for the record that the licensee has begun
9 those internal discussions.

10 JUDGE BOLLWERK: Ms. Monteith, this is
11 Judge Bollwerk. Could you just go back, you mentioned
12 a field survey and a couple of other things. Could
13 you just tell us again, I think there were three
14 things, but maybe I missed one. Field survey was one
15 of the things you said you were looking at?

16 MS. MONTEITH: Your Honor, the options
17 that we are currently discussing involve a potential
18 tribal field survey --

19 JUDGE BOLLWERK: That would involve what
20 generally?

21 MS. MONTEITH: That's one of the things
22 that we are discussing, Your Honor.

23 JUDGE BOLLWERK: All right.

24 MS. MONTEITH: It could involve
25 potentially the hiring of a trained surveyor to

1 facilitate a tribal walk through of the site, and a
2 focused survey of areas to be physically disturbed by
3 the project or any other methodology. Those things we
4 are actively considering.

5 JUDGE BOLLWERK: So that's basically
6 somebody, boots on the ground walking around. I don't
7 want to over-simplify it, but--

8 MS. MONTEITH: Yes, Your Honor.

9 JUDGE BOLLWERK: --is that correct?

10 MS. MONTEITH: Correct.

11 JUDGE BOLLWERK: You mentioned I think a
12 tribal council?

13 MS. MONTEITH: Yes, that would be meeting
14 with tribal council with the Oglala Sioux and the
15 Lakota Sioux tribes. Another element we--

16 JUDGE BOLLWERK: That's a CIL rather than
17 an SEL, right?

18 MS. MONTEITH: Yes, yes.

19 JUDGE BOLLWERK: Okay.

20 MS. MONTEITH: And the other element we
21 mentioned before, interviews potentially of tribal
22 elders.

23 JUDGE BOLLWERK: Okay, is that getting
24 into the ethnographic study area, if I'm understanding
25 correctly?

1 MS. MONTEITH: Yes and no, I think
2 ethnographic studies might incorporate that kind of
3 information, but those interviews can have merit on
4 their own, and they can provide source information for
5 an ethnographic study, but the ethnographic study
6 would I think also entail other activities as well.

7 JUDGE BOLLWERK: Okay. All right, and do
8 you know what those other activities are?

9 MS. MONTEITH: I do not have that
10 information yet, Your Honor.

11 JUDGE BOLLWERK: Okay.

12 MS. MONTEITH: No, I shouldn't speculate.

13 JUDGE BOLLWERK: Okay, that's fine. And
14 then was there something else, or is that the three?

15 MS. MONTEITH: Those are the three we
16 articulated; I think an ethnographic study is
17 something else, but again, these are all points of
18 discussion; there's no alignment yet internally on a
19 path forward.

20 JUDGE BOLLWERK: And I appreciate it.
21 Appreciate the explanation. Thank you.

22 MR. PUGSLEY: Judge Bollwerk, this is
23 Chris Pugsley for Powertech, just a reminder, and Mr.
24 Thompson can correct me if I'm wrong, but I know that
25 our programmatic agreement that is attached to our

1 license by condition has an opportunity for tribal
2 monitors to be on the ground when site development
3 activities occur under the license. So I think that's
4 important to note.

5 JUDGE BOLLWERK: Okay, thank you sir. Can
6 I just say that having heard those three items, does
7 the tribe have anything further it wants to say,
8 recognizing that, you know, there hasn't been any
9 direct interaction, but that's what the staff has
10 under consideration? Is any of that in the ballpark
11 of what you're talking about in terms of the points
12 you raised? I'm sure they were much more detailed
13 than that, but is there anything you want to say on
14 that point?

15 MR. PARSONS: Thank you, Your Honor. This
16 is Jeff Parsons with the Oglala Sioux tribe. This is
17 the first time the Sioux have heard those proposals,
18 so obviously the devil, as you mentioned, is in the
19 details, but those are certainly some of the things
20 that we were suggesting and trying to push forward for
21 negotiations historically, so.

22 JUDGE BOLLWERK: Thank you.

23 MR. PUGSLEY: Judge Bollwerk, Chris
24 Pugsley with Powertech. I feel the need based on that
25 statement to interject there that site surveys and

1 ethnographic studies, this is not the first time this
2 has been proposed. These were--this has been a very
3 elongated process, and ethnographic studies and site
4 surveys have been proposed throughout the entirety of
5 the process. Now grant you, there hasn't been
6 agreement reached between the parties, which is
7 understood from the record, but these are items that
8 have been raised before, and I think that if this is
9 something that the staff is actively considering as we
10 made clear earlier, and Powertech concurs with your
11 comments in the decision in LBP-1709 that we need to
12 get moving here, that these things were on the table,
13 they didn't happen--they're on the table, they may be
14 on the table again. So if we're going to do
15 something, we have to do something.

16 MR. FRANKEL: David Frankel for
17 Consolidated Intervenors. Could we have a second,
18 since we haven't had a chance to speak?

19 JUDGE BOLLWERK: That's fine with me, Mr.
20 Frankel. Go ahead.

21 MR. FRANKEL: Okay, thank you. First of
22 all, I just want to thank the staff for taking a look
23 at what the tribe proposed. Many of our clients are
24 in this discussion because they're tribal members. I
25 feel like the staff, when it makes reference to being

1 in touch with the licensee and the tribe, and it omits
2 to reference Consolidated Intervenorors, it makes us
3 feel left out. So since we are recognized parties in
4 this transaction and this proceeding, I would really
5 appreciate it if the staff included Consolidated
6 Intervenorors in their thinking and in the discussions,
7 that's the first point. The second point I wanted to
8 make is that one that there has been complete
9 consistency on from the standpoint of the Tribal
10 Historic Preservation Officers in office from time to
11 time was articulated very clearly by Mr. Michael
12 Catches-Enemy; that testimony has been presented in
13 various pleadings in this case, and I just want to
14 emphasize that the tribe has always objected to one
15 shot deals, to single visits that somehow bind them
16 and has repeatedly suggested a process that includes
17 a chance to go out into the field and have those boots
18 on the ground, a chance to come back, talk amongst
19 themselves, talk with their elders, go back again to
20 address issues that come up during those talks, come
21 back and iterate this a few times, not ad infinitum,
22 but a few times.

23 And so to the extent that the proposal
24 comes back, and it's a single site visit, and it's not
25 sensitive to these cultural-based requests, I feel

1 like we're not going to get anywhere. To the extent
2 that the proposal comes back and includes some dignity
3 for these culturally-based requests, I feel like we're
4 going to get no traction. So I would just ask the
5 people who are making the decision about what
6 constitutes the staff's alignment that they consider
7 those things. When the tribe gets a proposal and it's
8 a very narrow time period, a narrow time frame as
9 compared to a broader time frame, then there's
10 resistance. And finally, when the weather is not
11 taken into consideration, and things are scheduled for
12 times that are inappropriate because there's snow and
13 ice on the ground, again, that creates resistance. So
14 I think that there is some flexibility here and some
15 pathway that can minimize that kind of resistance.
16 Thank you.

17 CHAIR FROEHLICH: Thank you, Mr. Frankel.

18 MR. PARSONS: Yes, this is Jeff Frankel--

19 CHAIR FROEHLICH: Sorry Jeff, go ahead.

20 MR. PARSONS: Thank you very much. I
21 would only--I appreciate Mr. Frankel's
22 characterization, I think that's all very well said.
23 I would just want to be on the record objecting, or at
24 least disputing the characterization that Mr. Pugsley
25 put forward. I think it's well established in the

1 record how this has all transpired, and not to get
2 into it in depth, but we dispute his
3 characterizations.

4 MR. PUGSLEY: All right, well Judge
5 Froehlich, Chris Pugsley for Powertech. We can--Mr.
6 Parsons and I can agree to disagree on this, but one
7 thing that Mr. Thompson and my client would like to
8 propose in terms of answering question 2 about
9 communication is we think these--we've had a lot of
10 experience in the past with NRC staff and with
11 licensing Board regarding status calls. We think that
12 what we're doing today is a very good idea, and we
13 would like to propose given the Board's schedule, and
14 certainly this may--you can take this into account for
15 our answer to the question regarding the Board's
16 schedule--we would like to propose monthly status
17 calls with the Board to go through where we are, what
18 we're doing, and what conclusions we may have reached
19 because we think that it's important for us to keep up
20 communication, and I think that everyone would benefit
21 from having monthly discussions.

22 CHAIR FROEHLICH: I thank you for that
23 suggestion, Mr. Pugsley. The Board had considered--
24 and we will get to that--a follow up to this telephone
25 status conference. I think it's important to all

1 parties that we move forward with some expedition on
2 this case and that anything to improve the
3 communications among the parties and with the Board I
4 think will help. Your goal in having a resolution of
5 this case I think is shared by the staff and the other
6 parties as well the Board.

7 MR. PARSONS: Your Honor, this is Jeff
8 Parsons. If I may, on the communication issue--

9 CHAIR FROEHLICH: Yes, sir.

10 MR. PARSONS: --we received a status
11 report at the beginning of November from NRC staff,
12 and it contained sort of the standard language. We
13 inquired to NRC staff counsel if with regard to the
14 parcel of the Board's most recent order about ensuring
15 that the record is brought up to date and that a
16 search has been done to make sure that all responsive
17 and necessary records that are necessary to be
18 disclosed, that some sort of search has been done.
19 NRC staff has at least informally confirmed to us that
20 they consider their November disclosure as fulfilling
21 the Board's mandate that records be--that parties
22 ensure that all responsive records are included in the
23 monthly updates, and I would ask that Powertech do the
24 same. It sounds like they may be in various
25 discussions and otherwise there's records that may be

1 responsive, so I'd ask them to make sure that they
2 confirm fulfillment of that requirement.

3 MR. PUGSLEY: Jeff, Chris Pugsley for
4 Powertech. We are certainly doing that, and we will
5 make sure that that is satisfied.

6 CHAIR FROEHLICH: I'm glad, and it's only
7 appropriate that all parties live up to their
8 requirements under the regs to provide monthly updates
9 as they relate to contention 1A; since this is an
10 ongoing proceeding, that disclosure requirement
11 continues in effect. I trust that the parties will
12 take on those responsibilities faithfully. Let us
13 return if we could to the enumerated questions that
14 the Board had if we could. I think we're--

15 MR. PUGSLEY: I believe number 3, Your
16 Honor.

17 CHAIR FROEHLICH: All right, I think we're
18 up to--thank you, Mr. Pugsley. The parties'
19 collective or independent efforts to identify a
20 methodology to identify tribal cultural, religious and
21 historical significance missing in the FSEIS. I
22 guess Ms. Monteith is probably the best person to
23 start off with this.

24 MS. MONTEITH: Your Honor, I believe we
25 actually have already addressed that question. It was

1 where we discussed the fact that we are in the midst
2 of internal discussions regarding these options, and
3 we enumerated some of them, such as a potential tribal
4 field survey meeting with tribal council and/or
5 interviews. And we're contending right now with
6 internal matters concerning overall costs of these
7 various issues and the financial cost, time, program
8 and personnel commitments, and then determining from
9 that and the input provided by the tribe in its May 31
10 letter, and we previously talked about our
11 communications with them regarding what they would
12 like to see in a path forward. So taking all of this
13 into account to arrive at internal alignment on what
14 we believe is the appropriate path forward. Once we
15 do that, we intend to confer with the licensee and the
16 Oglala Sioux tribe on the approach, and taking the
17 Consolidated Intervenor comments, we can also
18 certainly copy them on communication that we send to
19 the tribe and to the parties. We were doing so on
20 sort of a litigative fashion, but when discussing
21 these matters, we did not intend to cut out the
22 Consolidated Intervenor, but when we're communicating
23 with the tribe, they are the source of the information
24 that we are to pull into the FSEIS, so it wasn't our

1 intent to communicate with one party to this
2 proceeding without involving the others.

3 CHAIR FROEHLICH: I think Ms. Monteith
4 that's a fair procedure you are trying to make. I
5 think it would be beneficial to all to include all
6 parties or cc the Consolidated Intervenor on your
7 correspondence with the tribe or with Powertech.

8 JUDGE BOLLWERK: This is Judge Bollwerk.
9 Just so I understand. So when you reach alignment
10 among the staff, is it then your intention to send out
11 something in writing to everyone, or are you going to
12 have a phone conference or how are you going to
13 approach this?

14 MS. MONTEITH: We're still working out the
15 approach for that, Your Honor. It may be a
16 communication in writing, or it may be a public
17 meeting.

18 JUDGE BOLLWERK: When you say public,
19 you're talking about like--you said public, so you're
20 talking about some kind of an open conference out at
21 the site, or what do you have in mind?

22 MS. MONTEITH: That would be a
23 teleconference with, for example, if we were to speak
24 to the licensee on this, if it were to be a public

1 meeting, we would notice that and there would be an
2 opportunity for public participation I believe.

3 JUDGE BOLLWERK: All right. So I mean it
4 sounds to me--I mean, you're sort of entering into a
5 public process rather than a litigation process to the
6 degree that conferences amount the parties generally
7 are public matters, but obviously you can do that,
8 certainly could.

9 MS. MONTEITH: Yes, Your Honor, obviously
10 we're still considering how best to approach this.

11 JUDGE BOLLWERK: All right, thank you.

12 CHAIR FROEHLICH: Have the Consolidated
13 Intervenors or the Oglala Sioux tribe have any
14 subsequent thoughts or suggestions that they'd like to
15 make to the staff as the staff begins to pull together
16 its options on how to proceed? Are there any thoughts
17 or ideas that have come forward subsequent to that May
18 31 letter? Best to start with Mr. Parsons.

19 MR. PARSONS: Thank you, Your Honor. This
20 is Jeff Parsons for the Oglala Sioux tribe. The
21 tribe, as I stated earlier, believes that we were
22 fairly thorough in that May 31 letter in terms of
23 laying out issues that we'd like to discuss as
24 components of a survey, and so not having had the
25 opportunity to discuss those issues in substance with

1 NRC staff, I think that still remains our best
2 starting point.

3 CHAIR FROEHLICH: Okay, and Mr. Frankel,
4 did you have anything to add to your earlier comments
5 that the staff should take into consideration as it
6 continues to survey its options moving forward?

7 MR. FRANKEL: No, thank you Your Honor.

8 CHAIR FROEHLICH: Okay. And I guess to be
9 fair, Mr. Pugsley, is there anything that you'd like
10 to add to the discussion on this point as the staff
11 begins to look at its options moving forward?

12 MR. PUGSLEY: Your Honor, Chris Pugsley
13 for Powertech. One, we certainly concur with the
14 communication that you have recommended that all
15 parties be included; certainly no objection from the
16 licensee. I'd like to re-emphasize our point earlier
17 that even though we have appealed to the Commission
18 and we have requested a specific course of action, we
19 have begun an internal evaluation of what role we can
20 play in assisting the staff and the Consolidated
21 Intervenors and the Oglala Sioux tribe in satisfying
22 the Board's directive for contention 1A, and that we
23 have--we are interested in beginning discussion to
24 find out what that may be. And when we have those
25 discussions, then I'm hopeful that we will be in a

1 position to report back to the Board as to what might
2 be feasible.

3 CHAIR FROEHLICH: Okay thank you, Mr.
4 Pugsley. Let's move to item 4 if we could at this
5 point, and that goes I guess in part to the fact that
6 I guess some of the alternatives carry a cost, and
7 some of those alternatives may be cost-prohibitive.
8 I wonder what information the parties have as to the
9 costs that may be involved in complying with the CEQ
10 regs.

11 MR. PUGSLEY: Your Honor, Chris Pugsley
12 for Powertech. I think that it might be appropriate
13 for the licensee to weigh in on this. One thing that
14 we would like the Board to note for the record is we
15 are aware, after hearing the staff discuss what
16 options they are potentially considering, and through
17 partial internal review of the fact that there will be
18 costs associated with solutions to this issue. And
19 one thing that is important to note is that Powertech
20 has suffered, and it's evident from our appeal to the
21 Commission, that the company is a junior uranium
22 company, it is running on investment capital, and
23 every month it operates, it burns that capital. So as
24 time goes on, financial harm is suffered and things
25 become difficult, and we certainly want this

1 contention to be resolved, and while we aren't
2 currently in a position to offer a solid opinion on
3 what the costs are associated with different options
4 because we have not completed our internal review with
5 our experts, we do know that one thing that is
6 important to note is because this is a NEPA process
7 and it would result in some form of supplement to the
8 FSEIS for this project, that not only is Powertech
9 responsible for the cost of any activities that go on
10 out there, whether they be costs associated with
11 experts, costs associated with surveyors, or time with
12 other activities, we are also required under statute
13 to pay for NRC staff's time, and that is a significant
14 cost.

15 And we, while we are--as I've said before--
16 -very interested in getting this done in an
17 expeditious manner, we really believe that we need to
18 find out what is going to be done, what is being
19 proposed, as soon as possible so that we can make an
20 informed decision on what we're trying to do here.
21 And that is evident in our request to the Commission
22 for expedited review on our appeal, because we need to
23 figure out where we stand, and I think that this is
24 very important to us, and that's the reason that we've
25 said on this phone call that we want to increase

1 communication, we want to do monthly status calls, we
2 want to get everyone involved so that we know where
3 we're going.

4 CHAIR FROEHLICH: Thank you, Mr. Pugsley.
5 Ms. Monteith, has the staff been investigating I guess
6 the costs associated with the various alternatives
7 that the staff proposes to look into or to undertake?

8 MS. MONTEITH: Yes Your Honor, we have.
9 Staff has, as I stated, is considering the cost of the
10 various potential options in terms of financial costs
11 as well as time and program personnel commitments.
12 That is, again, a part of our current internal
13 deliberation; we can't provide any specific
14 information regarding cost at this time, but we hope
15 to be able to do so shortly.

16 CHAIR FROEHLICH: Okay, thank you. Mr.
17 Parsons, I wonder if from the perspective of the
18 tribes, whether the cost of the various alternatives,
19 I mean do the tribes have any experience with the
20 approaches that the staff is considering where you
21 might be able to give them some advice on what the
22 cost might be or what variations on the different
23 approaches might entail?

24 MR. PARSONS: Thank you, Your Honor. This
25 is Jeff Parsons for the tribe. I have not had

1 recently a detailed discussion on that with the Tribal
2 Historic Preservation Office staff. Certainly, the
3 tribe does engage in efforts similar to this, so that
4 would be something that I would be happy to research
5 for the discussion amongst the parties certainly. I
6 would note that certainly there was a survey conducted
7 prior to the application that was filed, and that was
8 a survey related to the archeological impacts
9 associated with the project, and we would assume that
10 that would be at least a reference point to consider
11 as well.

12 CHAIR FROEHLICH: Okay, thank you. Ms.
13 Monteith, has the staff conferred with other agencies
14 that are faced with this same time of deficiency in
15 its FSEIS and learned anything from their experiences
16 as to varying approaches or the costs of those
17 approaches?

18 MS. MONTEITH: Your Honor, the staff
19 conferred I believe with other agencies several years
20 ago, but I'm afraid I don't have any specific
21 information. I personally recall seeing a letter to
22 I believe the South Dakota SHPO asking for input
23 regarding a methodology for surveying the Dewy-Burdock
24 site, and they did not have any input to provide or
25 any information to assist us. But that would have

1 been in the time frame at least a couple of years
2 prior to the evidentiary hearing.

3 CHAIR FROEHLICH: Has the staff
4 considered, as part of the path forward from this
5 point, consulting with other federal agencies that
6 have similar NEPA responsibilities?

7 MS. MONTEITH: I do not believe that the
8 staff has. I would note that there--we are a little
9 distinct in our NEPA responsibilities because other
10 federal agencies generally have a land management
11 aspect rather than a licensee/licensing agency
12 relationship, so there's not going to be a one-to-one
13 equivalent I suppose between us and a lot of federal
14 agencies who operate in the area of the Dewy-Burdock
15 site. But to my knowledge, there has been no
16 engagement with other federal agencies on this
17 question recently.

18 CHAIR FROEHLICH: Thank you. Anything any
19 of the parties would like to add or state to question
20 4 that we had in our notice? Hearing none, let's
21 touch on question 5, and that's the staff's time
22 supplement, the FSEIS, and I assume we've covered
23 most of this, am I correct Ms. Monteith?

24 MS. MONTEITH: Your Honor, yes, I believe
25 so. We anticipate that a supplement to the FSEIS

1 would be the end result of the process to resolve
2 contention 1A.

3 CHAIR FROEHLICH: Can you just in general
4 terms, tell me the procedures that the staff engaged
5 in internally to bring forth an FSEIS? What has to be
6 done, what things have to fall into place and then how
7 long does that take?

8 MS. MONTEITH: Well, in order to
9 supplement the FSEIS, there would be several steps
10 that we would have to undertake beyond selection, of
11 course, of a methodology for resolving contention 1A.
12 But as I said, the methodology would most likely would
13 have to interface with the parties on carrying out the
14 methodology, and that means one of our elements, such
15 as I believe an on the ground field survey potentially
16 might be bidding out for a contractor to support the
17 limitation of the methodology. And then that leads to
18 documenting the results of it in a supplement to the
19 FSEIS; under 10 CFR 51.92, the requirements for a
20 supplementation of an FSEIS describes one of the bases
21 for supplementing an FSEIS is that there's new and
22 significant information relevant to the environmental
23 concerns bearing this action.

24 In that case, if that paragraph applies,
25 an FSEIS supplement would be accompanied by a request

1 for comments according to 51.73, that's 10 CFR 51.73.
2 That regulation describes the public comment
3 requirements for draft EISs and prescribes a period
4 of, in this case, approximately 45 days. So we would-
5 -I think most likely we're contemplating that we would
6 have a contractor's support supplementation of the
7 FSEIS drafting the draft supplement, then if we
8 determine that we would be issuing the supplement
9 under 51.92(a)(2), there would be a 35-day comment
10 period associated with that, then we would take into
11 account the information garnered during the public
12 comment period, and then we would issue a final
13 supplement.

14 CHAIR FROEHLICH: Thank you, that is
15 helpful. All right. Moving to our last point here
16 was the procedures going forward. I think that Mr.
17 Pugsley's suggestion of meeting approximately or
18 having telephone conferences approximately monthly
19 would make sense; about a month from now, however,
20 puts us right in the middle of the Christmas season.

21 JUDGE BOLLWERK: Let's do it.

22 CHAIR FROEHLICH: Let's do it?

23 JUDGE BOLLWERK: Yes, let's do it. A week
24 in December, pick a week, 11th through the 18th.

25 CHAIR FROEHLICH: All right.

1 MR. PUGSLEY: It's Chris Pugsley for
2 Powertech. Judge Bollwerk, we will be available
3 whatever date is selected. We'll make sure it
4 happens.

5 JUDGE BOLLWERK: Excuse me, Judge Barnett,
6 do you have any objection to that?

7 JUDGE BARNETT: No.

8 JUDGE BOLLWERK: All right.

9 JUDGE BARNETT: What week do you have?

10 JUDGE BOLLWERK: 11th through the 18th, it
11 doesn't make any difference to me, whichever one the
12 parties want to--

13 JUDGE BARNETT: I'm not available the week
14 of the 17th.

15 JUDGE BOLLWERK: Okay, but we would
16 certainly do it the week of the 11th?

17 JUDGE BARNETT: Part of that assumes that
18 the staff doesn't have anything to say about this--
19 integration process, so it's coming to a resolution
20 among the staff folks. Obviously we'll have more to
21 talk about if that happens before then; if it doesn't,
22 then we're going to be talking about what the staff's
23 process is or what the staff's schedule is. But
24 having said that, I would agree that we ought to
25 probably get together.

1 MR. PUGSLEY: I have no problem with that.

2 JUDGE BARNETT: I'm sorry?

3 MR. PUGSLEY: Powertech concurs.

4 CHAIR FROEHLICH: The staff or the
5 Intervenor, does that present any problems for any of
6 you?

7 MS. MONTEITH: Your Honor this--I'm sorry,
8 Emily Monteith for the NRC staff. I think can support
9 the availability of the week of the 11th; we can't of
10 course commit to having a firm position on a path
11 forward at that time, but we can certainly strive for
12 that, but we understand that we may not have much to
13 discuss at that time, we can support that week.

14 JUDGE BOLLWERK: Understood. Understood,
15 and we appreciate your efforts. And--

16 MR. PARSONS: This is Jeff--

17 JUDGE BOLLWERK: Go ahead.

18 MR. PARSONS: I'm sorry, Your Honor, this
19 is Jeff Parsons on behalf of the tribe. I have pre-
20 existing travel the 13th through the 15th, but the
21 11th or 12th conceivably would provide availability.

22 JUDGE BOLLWERK: Okay.

23 MR. FRANKEL: David Frankel here for the
24 Consolidated Intervenors. I'm available the 11th and
25 12th or 13th, but not 14th or 15th.

1 JUDGE BOLLWERK: Okay, so it sounds like
2 early that week.

3 CHAIR FROEHLICH: Right, the Board will
4 issue an order, we will have a follow up telephone
5 conference call on the 11th or 12th of December, and
6 I would hope at that point we can get an idea of any
7 progress that's been made amongst the staff in coming
8 up with alternatives, any efforts that the parties
9 have undertaken to provide the information necessary
10 to staff if there's been any changes, but mainly to
11 keep this on track towards an expeditious resolution,
12 which I think is in everyone's best interests.

13 JUDGE BOLLWERK: Have we talked about
14 number 6 yet?

15 CHAIR FROEHLICH: Well, 6 is the parties'
16 positions on moving forward; I think you're probably
17 referring to the request of potential for a
18 settlement?

19 MR. THOMPSON: And Judge Froehlich may I--
20 this is Anthony Thompson. I will not be available on
21 the 11th, but I would be on the 12th or the 13th.

22 JUDGE BOLLWERK: Well it looks like the
23 12th is going to be the date unless somebody has an
24 objection.

1 CHAIR FROEHLICH: All right, then we can
2 all place on our calendars on the 12th, and we'll
3 issue an order to confirm. But Judge Bollwerk, you
4 wanted to raise--

5 JUDGE BOLLWERK: I mean the question of
6 settlement judge obviously depends on what the parties
7 want to do because under the agency's rules, you all
8 have to agree that you would move forward with the
9 settlement judge. It sounds like the staff is still
10 in the process of trying to come to an internal
11 agreement about how they want to proceed that would
12 obviously be important to them. I'm assuming that the
13 parties would before they -- do you all want to hear
14 from the staff before you talk further about that
15 possibility?

16 MR. PUGSLEY: Judge Bollwerk, Chris
17 Pugsley for Powertech. Yes, we would like to hear
18 from the staff before, because we had determined prior
19 to hearing from the staff today that we didn't think
20 a settlement judge was appropriate at this time, but
21 now that you make the point you've made, we'd like to
22 hear from the staff first.

23 JUDGE BOLLWERK: All right. But yes, and
24 so I would say from my perspective, I was encouraged
25 to hear what Powertech had to say. I understand your

1 position, I understand you filed an interlocutory
2 appeal with the Commission, you anticipate you may or
3 may not get the Commission's position on all this, a
4 decision from them sometime soon or sometime much
5 later. But you sound like you are willing to talk
6 with the folks that are involved with this, the staff
7 and the tribes and the Consolidated Intervenor, about
8 the things that they're thinking about, and I
9 appreciate your willingness to engage in that
10 conversation at the appropriate time. I think that
11 will move things forward as soon as possible.

12 MR. PUGSLEY: That's absolutely right,
13 Judge Bollwerk. We--our interest is the project, and
14 we have our appeal, we've adopted our legal position,
15 but we are most interested in resolving the concerns
16 of the Board with the Consolidated Intervenor and the
17 Oglala Sioux tribe either way possible, whether it be
18 at the Commission level or at the Board level.

19 JUDGE BOLLWERK: All right, I appreciate
20 that comment. But otherwise, we have what we need at
21 this point?

22 CHAIR FROEHLICH: I think we have what we
23 need, and unless any of the other parties have
24 anything they'd like to add at this point or say to
25 the Board, we will next get together on the 12th of

1 December for a telephone conference. I would hope in
2 the meantime that the communications amongst the
3 parties continue or ramp up so that all parties are
4 aware of what the other parties are doing, thinking or
5 working on so that we can move forward with the
6 resolution of contention 1A.

7 MR. THOMPSON: Judge Froehlich, this is
8 Anthony Thompson. Judge Bollwerk had mentioned if we
9 had information with respect to South Dakota, for
10 example, holding off. We do, and we will forward it
11 to you. They made a decision to pull back on the
12 state hearing until--on the mining permit until both
13 NRC and EPA have made their final decisions, and we
14 can provide that to the Board.

15 JUDGE BOLLWERK: All right, thank you very
16 much.

17 MR. PUGSLEY: Yes sir, Chris Pugsley
18 again. Mr. Thompson's right, what we will do is file
19 it as a request for the Board to take judicial notice
20 of what the entity has or has said in formal
21 correspondence. I'd also just like to add very
22 quickly for the record that you know, we've spent some
23 time, the licensee has spent some time talking about
24 how we're willing to listen to what people have to say
25 for solutions. I think that it should be noted to all

1 the parties that there are discussions that need to be
2 had that are outside of these status conference calls
3 that we're available. So I think, you know, don't
4 hesitate if there's an idea, because I know Judge
5 Froehlich had asked a few questions earlier regarding
6 possible solutions, possible discussions that the
7 Oglala Sioux tribe or Consolidated Intervenor have
8 had. You know Mr. Thompson and I always believe that
9 more information is better than less information, so
10 if there's information, we'd like to know about it.

11 MR. PARSONS: Your Honor, this is Jeff
12 Parsons on behalf of the tribe. Just to respond to
13 question 6 in the Board's scheduling order. The tribe
14 and I believe Consolidated Intervenor have both
15 communicated to the rest of the parties that we are
16 amenable to exploring the appointment of a settlement
17 judge to help the discussions. We've got a lot of
18 interest I think in starting discussions; my fear,
19 however, is when we start talking about protocols and
20 methodologies and costs associated with them, we may
21 need a little more direction and attention.

22 JUDGE BOLLWERK: Which in your view would
23 benefit from a settlement judge or not? I'm not sure
24 I understand what--

1 MR. PARSONS: So my--I'm sorry Your Honor,
2 Jeff Parsons again. My point was that the tribe and
3 Consolidated Intervenor have communicated that they
4 are willing to explore the appointment of a settlement
5 judge.

6 JUDGE BOLLWERK: All right. I guess it
7 would have to be an unanimous request from all parties
8 to proceed along that route and if that is what the
9 parties desire, that's perfectly acceptable to this
10 Board. If you think that will help you reach some
11 resolution, you should definitely go down that path.
12 But again, that's your decision, and I understand from
13 Powertech's viewpoint and perhaps from the tribe as
14 well, they'd like to hear what the staff has to say
15 first before they make any kind of move in that
16 direction, and that seems reasonable to me at this
17 point.

18 MR. PUGSLEY: Judge Froehlich, Chris
19 Pugsley again for Powertech. One other item I'd like
20 to offer if I may under question 6, which is as--I
21 think everyone on the phone is aware that the
22 Commission's regulation, we'll all interested in
23 expeditious resolution of this matter, and if this
24 were to proceed to an evidentiary hearing, the
25 Commission's regulations at 10 CRF Part 2 do allow for

1 contentions to be litigated purely in writing, and not
2 necessarily in an oral hearing, which as we all know
3 requires a multitude of steps and a lot of different
4 things. And because unlike our previous proceeding
5 where we had an oral hearing where there was serious
6 value to having oral testimony from witnesses on I
7 think--I can't remember the exact number, but I think
8 it was seven or eight contentions. In this particular
9 case, we're dealing with one contention that's based
10 on NEPA that is purely legal based, and I just wanted--
11 -and I'm certainly not in a position right now to ask
12 the parties on the phone to offer an answer on this,
13 but I would like if possible to float that as an idea
14 that we may come to an agreement, which is required
15 under the regulations, that we consider conducting, if
16 we get to an evidentiary hearing, we conduct it in
17 writing. Just something to think about, and maybe the
18 parties can come back with their answer on our status
19 phone call next month.

20 JUDGE BOLLWERK: I think that discussions
21 having to do with the appointment of a settlement
22 judge or the possibility of having something other
23 than an oral hearing at the conclusion is something
24 the parties should discuss amongst themselves, and I
25 think the Board and the Commission's regulations give

1 us enough flexibility to come up with a solution that
2 will work for everyone and will satisfy both the regs
3 and the statutes that are involved. That would be the
4 first time the regulations have been used, so.

5 MR. PUGSLEY: Well Your Honor, Chris
6 Pugsley again. I will send out a formal invitation to
7 all the parties internally asking my question about a
8 written hearing, and will respectfully ask their
9 response.

10 CHAIR FROEHLICH: That's fine, and it
11 can't hurt, and I think any communications, any
12 dialogue amongst the parties is constructive and
13 positive. I hope that it will be helpful to the staff
14 as they proceed with evaluation of the options that
15 they have for resolution, that this all be taken into
16 consideration and that we can make some progress on
17 taking care of this final contention in this case. Is
18 there anything else any party wishes to state while
19 we're still on the record?

20 MR. PUGSLEY: Your Honor, Chris Pugsley
21 from Powertech; nothing further.

22 CHAIR FROEHLICH: Any other party have--
23 hearing none, I think we can--oh Judge Barnett, I'm
24 sorry. Judge Barnett, did you have any follow up
25 questions at this point?

1 JUDGE BARNETT: No.

2 CHAIR FROEHLICH: And you, Judge Bollwerk?

3 JUDGE BOLLWERK: I'm good, and I think
4 we've made some progress here today potentially, but
5 you know, we'll see.

6 CHAIR FROEHLICH: We'll see. But hearing
7 none, I would conclude our telephone conference today,
8 and ask that the court reporter stay on the line
9 because we have a few administrative matters to take
10 up with him. Hearing nothing further, this telephone
11 conference is adjourned. Thank you all.

12 MR. PUGSLEY: Thank you, Your Honor.

13 (Whereupon, the proceedings were concluded
14 at 3:23 p.m.)

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